No. 145.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1960.

FOOTE MINERAL COMPANY,
Petitioner,

vs.

MARYLAND CASUALTY COMPANY,
Respondent.

RESPONDENT'S BRIEF

In Opposition to the Petition for Certiorari.

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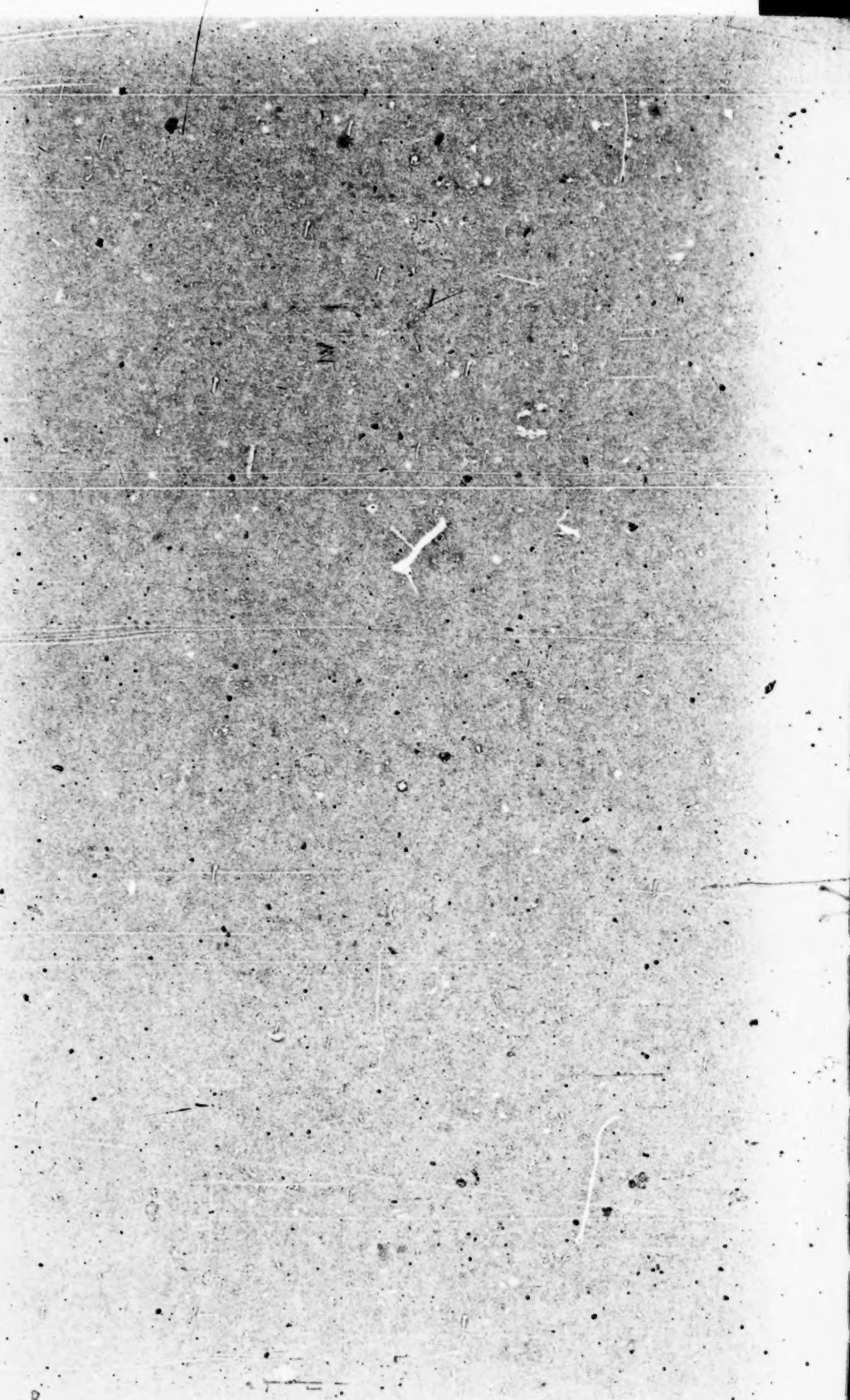

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RESPONDENT'S BRIEF

In Opposition to the Petition for Certiorari.

Respondent, Maryland Casualty Company, prays that the petition of the Foote Mineral Company for a writ of certiorari be denied.

QUESTION PRESENTED.

Respondent is dissatisfied with petitioner's statement of the question presented because not one of the several bases upon which the questions is predicated appears in the record. Nevertheless, petitioner's question, even as thus inaccurately posed, indicates that the two concurring decisions below turn solely upon the facts peculiar to this case, will affect few others except these particular litigants, and therefore should not be reviewed again.

Petitioner's statement of the question first infers that the Court of Appeals permitted the District Judge to insert an entirely new and additional provision in an insurance policy and thereby sanctioned the District Court's refusal to hold liable the insurance company which issued the policy. The record, however, denies that inference. The District Court added not a single word or phrase to the policy. The Court of Appeals merely concurred with the District Judge in his holding that because of the plain, ordinary and usual meaning of the phraseology in the policy, there was no insurance coverage under the facts.

Petitioner's statement of the question further infers that the Court of Appeals concurred with the District Court in holding that a portion of the insurance policy was "ambiguous." The record, however, likewise furnishes no support for that inference. The District Court did not hold any part of the policy to be ambiguous. On the contrary, the Court of Appeals concurred with the District Judge in his conclusion noted on pages 14a and 18a of the petition that the language of the policy is not obscure, is plain, and is not ambiguous.

Petitioner's statement of the question likewise infers that the Court of Appeals permitted the District Court to cast upon the petitioner "the burden of showing the non-applicability of an exclusion clause in a policy." Again the record denies that inference. The Court of Appeals merely concurred with the District Judge's conclusion that if petitioner claimed that a word in the insurance policy had a restricted or unusual meaning, a meaning other than its common, plain and popular meaning, petitioner had the burden of proving such restricted or unusual meaning. (p. 17a of the petition.)

Respondent submits that the sole question here before this Court is whether the same two questions which the

District Court decided, and in which decision the Court of Appeals concurred, shall again be reviewed.

The first question which the District Court answered in the negative, and in which answer the Court of Appeals concurred is: Was a direct electric current generator **in use**, in use within the meaning of an insurance policy protecting the insured against loss from an accident to the generator while it is "in use or connected ready for use," during the time the generator was not generating direct electric current, the purpose for which it was designed, having previously been rendered incapable of generating such electric current for a minimum period of the several existing hours following the physical removal from the generator of some of its vital component parts, and while several of its remaining parts were being operated in their usual manner in performing certain work on but one of the remaining parts?

The second question which the District Court answered in the affirmative, and in which answer the Court of Appeals likewise concurred, is: Was such an electric generator, **being repaired** within the meaning of the same insurance policy which further provided that the insurance company shall not be liable for an accidental loss which occurs while the generator is "being repaired," where at the time of the accident the generator was not then generating direct electric current, having previously been rendered incapable of doing so following the physical removal from the generator of some of its vital component parts, and although the circular metal surface of the generator's commutator (one part which had not been removed) was then being ground smooth by rotating the commutator at its usual speed against a grinding tool which had been temporarily attached to the generator for that purpose, thereby restoring the commutator to proper working condition after having become out of round and rough as a consequence

of previous use, such grinding of the commutator being necessary at irregular intervals?

Respondent submits that the answer which the courts below gave to the foregoing questions necessarily were dependent upon the facts peculiar to this particular case. Those answers are therefore significant only to the Foote Mineral Company and to the Maryland Casualty Company, and this case thus has no peculiar gravity or general importance. Respondent further submits, as hereinafter will be shown, that no Court of Appeals has rendered a decision in conflict with the decision in this case. Respondent consequently insists that the petition for certiorari should be denied.

STATEMENT OF THE CASE.

Respondent is likewise dissatisfied with petitioner's statement of the case. Being partially inaccurate, the statement is misleading. One inaccuracy is petitioner's statement that the policy protected against loss by accident to an electric generator, thus inferring that the policy covered only one piece of equipment. Actually, the policy protected against loss by accident to numerous pieces of equipment, the generator in question being but one of them.

Another such inaccuracy is petitioner's statement that "At the time of the accident the generator was in operation for one of its periodic customary uses, of grinding its own commutator . . . ." Such statement begs the question, because one of the two principal issues in this case is whether the generator was **in use** when the accident occurred. Petitioner's statement, therefore, takes for granted one of the very conclusions in dispute.

Another inaccuracy is petitioner's statement that, "The District Court added to the insuring clause of the policy

'in use' the phrase 'for the production of direct current electricity', . . ." and that the Court of Appeals affirmed such action. As previously mentioned, the record contains no basis for such a statement. Neither court below added a single word or phrase to the policy. The Court of Appeals merely affirmed the District Judge's action of declining with respect to context, in connection with the subject matter which was the electric generator, the phrase **in use** as it appeared in the insurance policy referring to the generator.

With the exception of the foregoing inaccuracies petitioner's statement of the case satisfies respondent.

ARGUMENT

The effect of petitioner's position that the court below yielded a condition which did not previously appear in the policy is that petitioner thereby insists that the Court of Appeals allowed the District Court to "write in" the policy a new limitation or restriction which previously had not been there. That insistence, however, is completely unsupported by both the facts of the case as well as by the District Court's opinion. In that opinion the District Judge merely held that the plain, ordinary and popular meaning of certain original language appearing in the policy (**in use** and **being repaired**) was not as broad and all-encompassing as petitioner would have had the court hold (pages 14a et seq. of the petition). Consequently such District Court holding, obviously, did not result in the inserting or writing into the policy of a condition, limitation, or restriction which had not previously been there. The opinion merely recognized the presence of a pre-existing limitation or restriction upon the meaning of the language in question, and which limitation or restriction resulted from the ordinary and popular understanding of that language.

In achieving the foregoing result, the court considered the facts of the case, as well as the language of the policy, by two rules of interpretation. The first of these rules was that the language of an insurance policy must be construed according to its plain, ordinary and popular meaning unless by some known usage it has acquired a different meaning, or unless it was the intention of the parties of the contract to use it as a technical or peculiar sense. The second rule which the court recognized was that the usual and ordinarily understood meaning of an object being "in use" is when said object is being used for the purpose for which it was designed (pages 14a and 15a of the

petitioner. The court further concluded that the meaning of the phrases **in use** and **being repaired** is not obscure, is plain and unambiguous (pages 18a and 19a of the petition). The court then found as a fact that the generator covered by the policy was designed to produce direct electric current (page 15a of the petition).

The court applied its foregoing findings of fact to its said conclusions of law and held that inasmuch as the generator was designed to produce direct current electricity, but was not being used for that purpose at the time of the accident, the generator was not then **in use** within the plain, ordinary, and popular meaning of the phrase **in use** (page 15a of the petition). The court, further held that when the particular facts of this case were measured by common, plain, and popular definition of the word **repair**, the generator was **being repaired** at the time of the accident within the common, plain, and popular understanding of the meaning of that word. Respondent submits that such process of reasoning by the court conclusively shows that it merely interpreted existing words in the policy and in no sense did it add any new condition to the policy which was not already there. The court only interpreted certain phraseology of the insurance contract, upon the meaning of which phraseology the parties differed, and attributed to that phraseology what the court found to be its plain, ordinary, and popular meaning. Respondent submits that because such plain, ordinary, and popular meaning, as thus found by the court, happens to be at variance with the meaning which petitioner would attribute to that phraseology does not result in the court having added a new condition to the policy. Consequently, the cases which petitioner cites as stating the settled rule that a court may not add a new condition to an insurance policy, rewrite it, and make a new contract for the parties, have no application to this case. The applicable rule is

that noted in the case of **Wallace v. State Farm Mutual Automobile Insurance Company**, 187 Tenn. 692 (1948), which case petitioner cites on page 4 of its petition, where the Tennessee Supreme Court said that if an insurance contract is not ambiguous the court has the duty to apply to the words used in it their ordinary meaning, and neither the insuror nor the insured is to be favored in the interpretation of such words.

Respondent further submits that the decision of the court below is just and equitable as well as correct. The insurance policy before the Court protected the insured against loss arising from an accident to certain specified equipment, which equipment included an electric generator, while the generator was **in use**, unless the generator was then **being repaired**. The policy therefore furnished only limited insurance coverage. For example, the policy did not purport to furnish protection against loss **arising out of the use** of any of the specified equipment as did the automobile policy considered in the case of **Fidelity and Casualty Company of New York v. Lott**, 273 Fed. 2d 500, which petitioner erroneously cites in support of its position. Furthermore, even if the generator were **in use** (was generating direct current electricity) upon the happening of an accident to it, no insurance coverage exists if the generator was simultaneously **being repaired**. A definite reason exists for such limited coverage. As the District Court found from the evidence, when the generator is being employed or used for any purpose other than generating direct electric current, or is being repaired, the hazard of an accident to the generator is thereby increased, and insurance against such increased hazard requires the payment of a larger insurance premium which petitioner had not paid (page 16a of the petition). Respondent consequently submits that for the court to have attributed to the words **in use** and **repair** a broader definition than

the usual, ordinary, and popularly understood meaning of those words as held and defined by the court would have been both incorrect as well as inequitable to the respondent Maryland Casualty Company.

The petition for certiorari should be denied.

Respectfully submitted.

CHARLES E. McNAIR,
STUART F. DYE,
Counsel for Respondent

August 8, 1960.